

## Does necessity know no law?

### Summary

This study analyses the experiences of Western – particularly Western European – countries upon declaring a state of emergency in response to terrorist threats. Its purpose is to identify relevant lessons that the Netherlands can learn from these countries. The main question is as follows: *‘What are the political and social consequences of governments declaring a state of emergency, particularly as a result of terrorist threats?’*

The analysis showed that it is too simplistic to define ‘the state of emergency’ as the opposite of a normal state of affairs. Situations in other countries show there are different types and degrees of states of emergency, and that emergency measures can be taken in addition to the declaration of a state of emergency. Furthermore, even with no formal (de jure) state of emergency/emergency measures, certain emergency measures can be implemented in the event of an ‘exceptional situation’. This can result in a de facto ‘state of emergency’ being experienced by some or many. These give the government a wider range of courses of action. However, exactly what these courses of action include depends heavily on legal and institutional conditions, which differ from country to country.

Furthermore, the analysis shows that emphasising the ‘exceptional’ nature of the situation and declaring that there is an ‘emergency’ (in whatever form and to whatever degree) are not necessarily effective courses of action. It is evident that governments only have limited control over the consequences of their actions. Declaring a state of emergency and/or implementing emergency measures will not immediately mitigate a terrorist threat, yet it can be difficult to rescind the state of emergency, politically or otherwise. To prevent the government from getting its hands tied by the unmanageable consequences of its own actions, it is vitally important to develop a range of subtle and specific measures to tackle exceptional/emergency situations.

In addition to broad reflection on states of emergency in Western countries over the years, this study focuses in particular depth on the experiences in three of these countries: *France, Belgium and Germany*. 2016 is a key focus in the study as all three countries were affected by various terrorist attacks in this year. Based on policy reports, academic studies and interviews with experts (local or otherwise), the report paints – for each country – a picture of the context, the terrorist threat and the measures taken that relate to the ‘emergency’ in some way or other. Subsequently, the report analyses to what extent the measures enabled *effective, legitimate* (legal and with the support of society) and *robust* (with sufficient capacity and endurance) action, and what effect these interventions had on the threat, the rule of law and society. In this regard, special attention is paid to the government's performative function, including language, communication and symbolism.

The developments in France, Belgium and Germany support the previous picture. In their response to exceptional or emergency situations, governments have to make a decision regarding the following aspects:

- a) the specific or general nature of the measures;
- b) the degree of deviation from the regular rule of law and policy practice;
- c) the duration of exceptional interventions;
- d) the rhetoric in which the measures are packaged.

The courses of action available to the government are not only limited by the nature and intensity of the threat (which can be qualified as an 'exceptional circumstance' or 'emergency', in varying degrees), but also by the legal and institutional structures in the country in question, including the administrative structure and culture. For example, the centralised French presidential system enables governments to conduct stronger interventions with stronger communication and measures than the more decentralised German and Belgian systems, which require greater restraint from a legal perspective.

The three cases show that the government does not have full control of the course and consequences of the action taken. Of course, society and the rule of law benefit from the prevention of attacks and the removal of concrete threats. However, emergency measures also have unexpected and unmanageable effects on terrorist threats, society and the rule of law. Formal and strong measures often have little impact on society, while specific, policy-related measures can have major consequences, for example, restriction of citizens' freedom to act. The broadly established state of emergency in France led to a great deal of police work, but had limited impact on society. One specific measure in Belgium that prohibited anonymous SIM cards meant that two million users of pay-as-you-go mobile phones had to register their SIM card. Furthermore, the rise of social media and protest parties have created a whole crowd of high-profile fearmongers who use the threat of terrorism for their own political agendas. In the countries investigated, strict laws were passed during the period of the threat which may not have been passed in a different and less threatening climate.

Although the implementation of measures to remove threats remains a desirable course of action, experiences in the three countries investigated show that these measures alone are not enough to remove the threat. Yet, they can have substantial impact on democracy and the rule of law. The government's ability to intervene regarding the threat is initially boosted by the extra measures and by society's explicit and implicit support for these measures, although in the long-term, the effectiveness, legitimacy and robustness have been found to be somewhat limited. The threat is not removed; the measures are resisted by NGOs, lawyers and opinion leaders; and the measures ask a great deal of the emergency and civil services charged with executing them. The impact of the emergency on society and the rule of law soon becomes more permanent as reversing these emergency measures becomes politically inexpedient.

The Netherlands can learn from these experiences abroad. It is important that we:

- (1) Explore what type of reaction is most suitable for the Dutch administrative structure and culture
- (2) Reinforce legal and policy-related instruments wherever necessary in order to enable more subtle and varied responses to any threats that arise (with threats being qualified as 'exceptional circumstances' or 'emergency', in varying degrees)
- (3) Continually anticipate and reflect upon the unexpected and unintended effects of government action in exceptional/emergency situations
- (4) Continually consider how the state of emergency can be rescinded

By lessening emphasis on the emergency, we can ensure that necessity does indeed know law.